

July 26, 2022

7947

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERROD, TEED, VANDERHAGEN and WARE,

Plaintiffs,

-v-

Case No. 17-10164

VNA and LAN,

Defendants.

/

JURY TRIAL

BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

JULY 26, 2022

APPEARANCES:

For the
Plaintiffs:

Corey M. Stern
Levy Konigsberg, LLP
605 Third Avenue, 33rd Floor
New York, New York 10158

Moshe Maimon
Levy Konigsberg, LLP
605 Third Avenue, 33rd Floor
New York, New York 10158

Melanie Daly
Levy Konigsberg, LLP
605 Third Avenue, 33rd Floor
New York, New York 10158

(Appearances Continued on Next Page)

TO OBTAIN A
CERTIFIED
TRANSCRIPT:

JESECA C. EDDINGTON, RDR, RMR, CRR, FCRR
FEDERAL OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
200 EAST LIBERTY STREET
ANN ARBOR, MICHIGAN 48104

July 26, 2022

7948

| | | |
|----|-------------|--|
| 1 | For the VNA | Daniel Stein |
| 2 | Defendants: | Mayer Brown LLP |
| 3 | | 1221 Avenue of the Americas |
| 4 | | New York, New York 10020 |
| 5 | | Mark R. Ter Molen |
| 6 | | Mayer Brown LLP |
| 7 | | 71 South Wacker Drive |
| 8 | | Chicago, Illinois 60606 |
| 9 | For the LAN | Wayne Brian Mason |
| 10 | Defendants: | Faegre Drinker Biddle & Reath LLP |
| 11 | | 1717 Main Street, Suite 5400 |
| 12 | | Dallas, Texas 75201 |
| 13 | | David C. Kent |
| 14 | | Faegre Drinker Biddle & Reath LLP |
| 15 | | 1717 Main Street, Suite 5400 |
| 16 | | Dallas, Texas 75201 |
| 17 | | Philip A. Erickson |
| 18 | | Plunkett & Cooney |
| 19 | | 325 East Grand River Avenue, Suite 250 |
| 20 | | East Lansing, Michigan 48823 |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

July 26, 2022

7949

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E XWITNESSESPAGE

(None)

EXHIBITSMarkedAdmitted

(None)

MISCELLANYPAGE

Proceedings.....7950
Certificate.....7968

July 26, 2022

7950

P R O C E E D I N G S

THE CLERK: Calling Sherrod, Teed, Vanderhagen, and Ware vs VNA and LAN.

MR. STERN: Good morning, Judge.

Corey Stern and Moshe Maimon for the plaintiffs.

THE COURT: Thank you.

MR. STEIN: Good morning, Your Honor.

Daniel Stein and Mark Ter Molen for VNA.

MR. KENT: And David Kent and Phil Erickson for LAN.

THE COURT: Terrific. Thank you. Please be seated. We have just a note. No verdict. And I think what I'll ask -- I don't know what Leslie sent to you -- is to make sure it's just a note and it's not a verdict.

So when we have a verdict, we will definitely put it in the email that the jury has sent a note that there's a verdict. No reason for anybody's blood pressure to be impacted more than it already is.

So, Leslie, can you -- this is -- apparently the jury I'm thinking is looking again at some LAN issues, because they would like the 1998 AB&H report, the 2003 Phase II study, and the 2011 Rowe report.

Do we have those, Mr. Kent?

MR. KENT: We don't have them here. The 2011 Rowe report was presented yesterday.

THE COURT: I thought so.

July 26, 2022

7951

1 MR. KENT: That was one of the documents that went in
2 yesterday.

3 THE COURT: Okay.

4 MR. KENT: And the 1998 AB&H report. Actually,
5 Moshe, you guys may still have that, because that was on your
6 list, as I recall. And the Phase II study, I think I know
7 which one that one is, too. That's different from the
8 treatability study, I believe.

9 THE COURT: Okay. Can't talk at the same time if
10 we're going to put it on the record.

11 And I just can't -- I just have to take these robes
12 to the dry cleaners, but I can't get enough days in a row, so
13 I'm just not putting anything filthy on here.

14 MR. ERICKSON: Your Honor, should we make
15 arrangements to have the 2003 report delivered? We can have
16 that over here in ten minutes probably.

17 MR. MAIMON: I think I have both.

18 MR. ERICKSON: You think you have both?

19 MR. MAIMON: So let me show you. This is the '98
20 report, right?

21 MR. ERICKSON: I believe so. But scroll up, please.

22 THE COURT: Mr. Stern, that is not my car that I was
23 driving. I just want you to know that would not have been my
24 choice of color. But what -- I was driving home yesterday and
25 I go by Ms. Daly and --

July 26, 2022

7952

1 MR. STERN: She tried to run me over.

2 THE COURT: Yeah. Because they're about to cross the
3 street. And that's my daughter's car. And she bought it used
4 and got a significant discount for the ugly color.

5 MR. STERN: I thought it was beautiful.

6 THE COURT: The very -- thank you. The very same car
7 in a different color was like \$2,000 more used. So she said,
8 "I'll go for the ugly car."

9 MR. TER MOLEN: Well, Your Honor, we have to ask what
10 color is it?

11 THE COURT: Well, it's a Toyota Prius Prime from
12 2016, I think. Early in -- when they were making these
13 hybrids that are electric and gas. So she can go 25 miles on
14 a charge, and then it switches over to gas, and you don't even
15 know it.

16 So and it's a teal blue, bright teal blue. It's not
17 bad. I've gotten used to it.

18 MR. ERICKSON: Should be very early in our witness
19 list, exhibit list.

20 THE COURT: Why don't we go off the record. We don't
21 have to discuss my daughter's car on the record.

22 (Off The Record)

23 THE COURT: So we have had a brief conference about
24 the requested exhibits. The 2011 Rowe report is already with
25 the jury. We have copies of the 1998 AB&H report, one copy

July 26, 2022

7953

1 each. And the 2003 Phase II study.

2 And I'll just hand it to the jury and mention that we
3 believe we gave them the 2011 Rowe report yesterday. And if
4 they want something else, just let us know.

5 MR. KENT: And, Your Honor, for the record, you might
6 identify those two by their exhibit numbers, so we know which
7 ones we actually give them.

8 THE COURT: Okay. They are LAN Exhibit 401 is the
9 final report. And LAN Exhibit 2 is the 1998 report. That's
10 what they're marked as on mine. But they're also marked as a
11 deposition exhibit, so.

12 Okay. And we will send you the notes next time. But
13 I ask that you not respond with a substantive response about
14 whether you think -- what we should do in response to the
15 note.

16 MR. MAIMON: We promise not to.

17 THE COURT: Okay. Because that's what I'm trying to
18 get on the record and not in a lot of emails. Okay. Thank
19 you.

20 (Pause In Proceedings)

21 THE COURT: Please be seated. Okay. Let's just --
22 we don't have to be on the record right now.

23 (Off The Record)

24 THE COURT: So we are back on the record in the Flint
25 bellwether case. And I am providing to the jury in response

July 26, 2022

7954

1 to a request for exhibits, four exhibits.

2 One is Plaintiffs' Exhibit 0259. It's an email
3 thread from Joseph Nasuta to Marvin Gnagy.

4 I am providing Plaintiffs' Exhibit 0174, another
5 email thread from Marvin Gnagy to Joseph Nasuta in 2016.

6 And Plaintiffs' Exhibit 0257. An email from Marvin
7 Gnagy to Kevin Hagerty in January 2016.

8 And the third is trial Exhibit 2462. An email from
9 Warren Green to Brent Wright regarding Flint water treatment
10 plant upgrades in August of 2014.

11 So I'm going to go bring this to them and then tell
12 them that we'll get an answer to them on their second question
13 right away.

14 (Pause in Proceedings)

15 THE COURT: So our jury just got their lunch. I just
16 want to report they seem to be in excellent spirits. They're
17 communicating. They're working. They're working. You can
18 just feel it in the room. So I told them that we would get
19 them a response to this question.

20 So now we're -- do you all have it now?

21 MR. MAIMON: Yes.

22 THE COURT: Okay. "What is the definition of
23 'required' in Question 1 part 1?"

24 I believe that's page 23 of the jury instructions.
25 And it's the word "required" in the third paragraph.

July 26, 2022

7955

1 "You must find that LAN breached the standard of care
2 if you find, 1" -- so this is Question 1 part 1 -- "that the
3 Flint water supply required the use of orthophosphates for
4 control."

5 They want to know does "required" as in making the
6 water noncorrosive.

7 MR. KENT: Is that what they said?

8 MR. MAIMON: No, no, no.

9 THE COURT: Okay. No. I want you to read it. Don't
10 trust me.

11 MR. KENT: That's what I'm --

12 MR. MASON: We don't have that note, Your Honor.

13 MR. MAIMON: She just sent it.

14 THE COURT: Oh, let's -- turn the microphones on.
15 We're on the record.

16 MR. ERICKSON: We have not seen the note that you're
17 referencing.

18 THE COURT: Let's just make -- I think the email's
19 not working. Let's make a hard copy --

20 MR. MAIMON: It's working fine, because it allowed us
21 to get the documents sooner.

22 THE COURT: I know.

23 MR. MAIMON: So for getting documents, it actually
24 helps.

25 MR. ERICKSON: Your Honor, we got one email with two

July 26, 2022

7956

1 questions and then it was a separate email. We didn't know we
2 had to check again.

3 THE COURT: Oh, I see. Here's what happened,
4 Mr. Erickson. They sent the first two messages at the same
5 time. I asked Bill to walk in and ask them to write out their
6 question in response to their question.

7 "Is it possible to get clarification on Question 1
8 and the instructions regarding it." Because we wouldn't know
9 what clarification to provide them. That's when we got the
10 additional handwritten note.

11 MR. ERICKSON: Perhaps we could have a couple of
12 minutes to consider it.

13 THE COURT: Please take your time.

14 In response to the jury, we are also sending
15 Plaintiffs' Exhibit 0473. And, Leslie, if you'll just hand
16 this to them.

17 MR. ERICKSON: Your Honor, we'd like to just take a
18 moment.

19 THE COURT: Please. Okay. I'm at 33 synonyms for
20 "required." Why not? There's some good ones. There's some
21 words I've never heard of, too. Just one. But one of them is
22 "called for" that the Flint River -- I've just started a note
23 back to them. Can I just say where I am?

24 "Dear members of the jury, dated July 26, 2022.
25 Thank you for your questions and for your requests for

July 26, 2022

7957

1 exhibits. The word 'required,' which I have in quotes, "on
2 page 23 of the jury instructions means that the Flint River
3 water called for orthophosphates."

4 To -- I mean to me, we learned -- I learned that no
5 water can reach zero corrosivity. So I would say Flint River
6 water called for orthophosphates to substantially reduce
7 corrosivity of the water.

8 MR. MAIMON: Or to substantially --

9 MR. KENT: Your Honor, we think that substantially
10 changes the meaning of the instruction. "Required" means
11 required.

12 I think what they're asking is required the use of
13 orthophosphates as the only way to make the water
14 noncorrosive. I don't see a difference between the two
15 options they're giving. But the idea is that --

16 THE COURT: Okay.

17 MR. KENT: -- orthophosphates were required,
18 mandatory, needed. Not just needed. Not just called for.
19 Required. That's the point.

20 Because there are numerous ways. The evidence showed
21 there are numerous ways to make water noncorrosive. And the
22 plaintiffs' argument is, no, orthophosphates are the only way.
23 And our point was, no, softening can make it noncorrosive.

24 THE COURT: Okay.

25 MR. MAIMON: So I'll never forget my high school --

July 26, 2022

7958

1 my freshman high school teacher taught us that when we were
2 called upon to give a definition of a word, you never use the
3 word to define itself.

4 THE COURT: Right.

5 MR. MAIMON: So just --

6 THE COURT: Unless you're under the Fair Labor
7 Standards Act where apparently every court used --

8 MR. MAIMON: She didn't know about that act.

9 THE COURT: Okay. Because it's not helpful.

10 MR. MAIMON: So I think if you look at the question
11 that was posed by the jury, especially the first question, "Is
12 it possible to get clarification on Question 1 and the
13 instructions regarding it?"

14 So Question 1, the only Question 1 is the Question 1
15 on the verdict form --

16 THE COURT: Correct.

17 MR. MAIMON: -- namely, did Defendant Lockwood,
18 Andrews & Newnam, LAN, breach the standard of care for
19 professional water engineer.

20 Then the instructions on it refer, I believe, also
21 appropriately as the Court did, to page 26 or to page 23 --

22 THE COURT: Okay.

23 MR. MAIMON: -- of that. But they're asking with
24 regard to Question 1, and then the instructions on it.

25 And I think that -- first of all, I do think that the

July 26, 2022

7959

1 synonym called for is appropriate. But I think also if you
2 read the question and the instructions together, is that it's
3 required or called for to meet the standard of care.

4 I also think -- just if I can finish the thought --

5 MR. KENT: Yes. I apologize.

6 MR. MAIMON: -- that it's the use of orthophosphates
7 for corrosion control as opposed to nobody said that
8 orthophosphates makes the water noncorrosive.

9 That wasn't -- all Mr. Green, Mr. Humann,
10 Mr. Ramaley, Dr. Lawler, Dr. Gagnon, all the experts said that
11 orthophosphates creates the barrier and prevents the leaching
12 out of lead from the pipes, but it doesn't make the water
13 noncorrosive.

14 And I don't think that you have to say that it's the
15 only way. So I think that both of those -- it's neither of
16 those.

17 MR. KENT: Actually, Your Honor -- go ahead.

18 THE COURT: What about on the list of synonyms under
19 the thesaurus.com, we also have needed.

20 So we could say, "The word 'required' on page 3 of
21 the jury instructions means that the Flint River water called
22 for or needed" -- we could give them options, one or the
23 other, orthophosphates to do what?

24 MR. MAIMON: I think the language that's in the
25 charge right now is fine for corrosion control, because they

July 26, 2022

7960

1 haven't asked for a definition of that part of the sentence.

2 They've asked for, quote/unquote, "required."

3 MR. KENT: Your Honor, we're going to suggest that
4 those are changing the term. When you look up -- when I look
5 up the definition of "required," the definition is,
6 "officially compulsory, otherwise considered essential,
7 indispensable."

8 And if you start weakening it down to, "called for,
9 needed," then you're changing the term substantially. And we
10 felt very comfortable with that term "required." That was the
11 basis of our argument to the jury. We didn't just say,
12 "needed, advisable, called for."

13 We argued "required" means required. "Compulsory,
14 essential, indispensable."

15 THE COURT: Okay. I'm on dictionary.com, and it says
16 required is "to have need of."

17 MR. MAIMON: "Needed" is fine, Your Honor. I think
18 it conveys what the Court's instruction was to the jury when
19 it used the term required.

20 MR. KENT: If we want to just keep looking at
21 definitions, Merriam-Webster. Required means, "stipulated as
22 necessary to be done, made, or provided."

23 THE COURT: Okay.

24 MR. KENT: There's a substantial --

25 THE COURT: So "needed." "Needed" is that.

July 26, 2022

7961

1 MR. KENT: Well, it's -- I would suggest it is less
2 of the compulsory. Necessary is more of the compulsory.

3 Here's another suggestion, Judge, and the one that I
4 understand is typically done is that the Court starts with --
5 interpret the -- use your own knowledge to provide the
6 ordinary meaning of the term and let the jury decide as
7 opposed to us try to restate it in ways that we clearly
8 disagree on the meaning of it.

9 MR. MAIMON: Except the jury has asked for
10 clarification. So I think that it's proper for the Court to
11 respond to them.

12 THE COURT: Yeah. I think they're stuck on this.
13 Because when I handed them the exhibits, they wanted the
14 answer to the question. I mean, they were happy to get the
15 exhibits, but they want the answer to this question.

16 What about the part of the question that says
17 "required as in the only way"?

18 MR. MAIMON: We would object to that. That's not a
19 definition of "required."

20 MR. KENT: Well, I think that it is, because it gets
21 to the essential, indispensable, necessary, according to a
22 particular purpose.

23 It's not just advisable. And that's our whole point.
24 That was our whole defense. Their argument was
25 orthophosphates were the only way. You had to have

July 26, 2022

7962

1 orthophosphates.

2 We said, "No, you didn't have to have them. They're
3 not useful in some circumstances. They are useful in others.
4 Softening was adequate."

5 If you do anything less than that mandatory aspect of
6 it, then you're changing substantially in the way this case
7 was tried.

8 THE COURT: Okay. Here's what I'm going to do. The
9 word "required" on page 23 of the jury instructions means that
10 the Flint River water needed orthophosphates for corrosion
11 control.

12 And "needed" is under dictionary.com but also in
13 common use is the same as "required." It needed it. It
14 required -- I need -- I don't, but I need insulin. I require
15 insulin for diabetes control.

16 So you object to that, Mr. Kent?

17 MR. KENT: Yes. We absolutely object to that, Your
18 Honor. We think it violates the evidence, and it violates the
19 meaning -- I say "violates."

20 It's not in conformity with the evidence, and it is
21 not in conformity with the way this case was argued or in the
22 way the word required should be given.

23 "Required" needs to be a more mandatory term,
24 "essential, indispensable."

25 THE COURT: We have four online dictionaries saying

July 26, 2022

7963

1 the word "need" is the definition of "require."

2 MR. KENT: That is one of the words I'm sure that is
3 available. I just read you three myself that I gave you the
4 mandatory compulsory nature of the word, which I think is far
5 more in keeping with the way that case was tried.

6 And that if you do otherwise, when you say it's
7 something that the jury is -- that those words are in common
8 parlance, then you might as well tell the jury, "You can
9 determine this on your own. Use your own knowledge to
10 determine the meaning of this word."

11 But I think it substantially changes things and is
12 prejudicial to us.

13 MR. MAIMON: So I don't think the Court proposed to
14 tell the jury that the word "needed" is common parlance. It's
15 responding directly to a jury question, and it makes sense
16 when the instruction is looked at, at a whole.

17 Specifically with regard to number 2 that LAN did not
18 sufficiently make this recommendation or warning or adequately
19 warn against operation of the treatment plant without the use
20 of orthophosphate corrosion inhibitors.

21 So I think it makes sense within the instruction as a
22 whole, and it's consistent with what is meant here. And it's
23 consistent with the definition of the word "required."

24 And if they require more -- if they need more
25 clarification, they can ask for it.

July 26, 2022

7964

1 MR. STEIN: I might also suggest in your response,
2 you refer them back to the instruction on page 22 about the
3 standard of care.

4 MR. KENT: Yes.

5 THE COURT: Okay. Let me look.

6 MR. KENT: That's a good point.

7 THE COURT: Thank you. Let me look at 22.

8 MR. MAIMON: You mean the last paragraph on 22?

9 MR. STEIN: The last paragraph.

10 MR. MAIMON: That's fine with us.

11 THE COURT: Okay. So let me not print that.

12 MR. KENT: It would be the entire instruction, not
13 just a part of the instruction, but the entire instruction on
14 22 on professional negligence.

15 THE COURT: So where do you want -- the word
16 "required" on page 23 of the jury instructions means that the
17 Flint River water needed orthophosphates for corrosion
18 control.

19 Please also -- how are we going to say this? Because
20 I don't want to single one instruction out above any other
21 instruction.

22 MR. MAIMON: So I think the following. You've asked
23 for clarification on Question 1 and the instructions regarding
24 it and specifically with regard to the word "required."

25 As to the word "required" in the instruction on

July 26, 2022

7965

1 page 23, it means that the Flint water supply needed the use
2 of orthophosphates for corrosion control.

3 THE COURT: Just a minute. I'm not Jeseca.

4 "You have asked for clarification on Question 1 in
5 the verdict form and the related instructions. And
6 specifically, the meaning of the word 'required' on page 23 of
7 the jury instructions"?

8 Okay. What do you recommend?

9 MR. MAIMON: I think that the definition or meaning
10 of the word "required" then continue as the Court had
11 anticipated.

12 The definition -- or with regard to page 23 of the
13 instructions, number 1 means that the Flint water supply
14 needed the use of orthophosphates for corrosion control.

15 With regard to Question 1 on the verdict form, you
16 should also consider the definition of -- or you should also
17 consider the instruction at page 22.

18 MR. KENT: And, Your Honor, if you're going to use
19 that word "needed," then I think the compromise achieves both
20 of our objectives is, "needed as the only way for corrosion
21 control."

22 That answers the question posed by the jury. It gets
23 to our point of it's mandatory versus just advisable. It gets
24 to the plaintiffs' point of they've got to sufficiently
25 recommend that. But if you go less than to anything that

July 26, 2022

7966

1 weakens that word "required," I think you've made a
2 substantial error.

3 MR. MAIMON: Doing what the defendants wants is not
4 the definition of "compromise." So it's not a compromise.
5 And I think the Court already indicated what it was going to
6 say.

7 THE COURT: What I have right now -- thank you,
8 Mr. Kent.

9 "Dear members of the jury, thank you for your
10 question and for your request for exhibits. You have asked
11 for clarification on Question 1 in the verdict form and the
12 related instructions. And specifically, the meaning of the
13 word quote/unquote 'required' on page 3 of the jury
14 instructions."

15 MR. MAIMON: You mean 23.

16 THE COURT: Page 23. What did I say?

17 MR. MAIMON: 3.

18 THE COURT: Oh. 23.

19 "The definition" -- then I have a new paragraph.

20 "The definition of the meaning of the word 'required'
21 on page 23 means that the Flint River water needed
22 orthophosphates for corrosion control.

23 "With regard to Question 1 on the verdict form, you
24 should also review the jury instruction on page 22."

25 I understand this is over your objection, Mr. Kent.

July 26, 2022

7967

1 And my response to that is that the word "need" and the word
2 "required" are synonymous. And I can't think of another way
3 that just gets a plain English response to the jury.

4 MR. KENT: Respectfully, Judge, we've given you
5 several plain English ways straight from the dictionary. And
6 I suggest that if I check the use needed -- the suggested word
7 "needed" does change the plain English meaning of the way this
8 case was tried, of the theories that were presented, and the
9 way the jury can interpret that.

10 I think it substantially weakens it.

11 THE COURT: Okay. And I listened to opening. I
12 actually went back and reread the openings so that I could
13 have context by the time of the closing. And I think this is
14 consistent with everything that I heard throughout the case,
15 so. I will say "please" also.

16 Any objection to me saying, "Please also review"?

17 MR. STERN: Not at all.

18 MR. KENT: No.

19 THE COURT: I just like -- you know, when I was
20 raising my kids, use the "I" statements and don't tell people
21 what to do, and they're more likely to do it if you don't say,
22 "you should." Like the first time somebody says, "you should"
23 to me , I'm like, "Cut it out."

24 Okay. Which I do need a lot of "you shoulds," but.

25 Okay. Leslie, I'm going to email this to you and see

July 26, 2022

7968

1 if you'll print it for everybody. I'll give them their
2 question back with this. Okay. I'm comfortable with this.
3 So I just signed it.

4 MR. MAIMON: You're sending it in there with the
5 question?

6 THE COURT: With the question after Leslie scans it,
7 so it can be a part of our record. If you're hanging around
8 here on Thursday morning, I'd be happy to fire up the oral
9 argument in Cincinnati. I'll be listening upstairs. You're
10 welcome to listen here.

11 MR. TER MOLEN: Thank you, Your Honor.

12 THE COURT: It's a peculiar experience, because, you
13 know, there's quite a few cases on appeal. And often I'm
14 listening, and I'm like, "Where's my lawyer there?"

15 Because sometimes the parties don't defend the
16 decision very well. Okay. I'll go bring this to them, and
17 we'll be in touch. Thank you.

18 (Brief Recess)

19 (Proceedings Concluded)

20 - - -

21 CERTIFICATE OF OFFICIAL COURT REPORTER

22 I, Jeseca C. Eddington, Federal Official Court
23 Reporter, do hereby certify the foregoing 22 pages are a true
24 and correct transcript of the above entitled proceedings.

25 /s/ JESECA C. EDDINGTON
Jeseca C. Eddington, RDR, RMR, CRR, FCRR

07/26/2022
Date